

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ASTIR F.,

Plaintiff,

CASE NO. C21-1350-MAT

v.

COMMISSIONER OF SOCIAL SECURITY,

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

Defendant.

Plaintiff appeals a final decision of the Commissioner of the Social Security Administration (Commissioner) denying Plaintiff's application for disability benefits after a hearing before an administrative law judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is REVERSED and REMANDED for an award of benefits.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1977.¹ Plaintiff has a bachelor's degree and previously worked as a certified nurse's assistant, data entry clerk, staff analyst, linguistics technician, and engineering specialist. AR 30. Plaintiff filed an application for Disability Insurance Benefits (DIB)

¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 on August 17, 2015, alleging disability beginning January 30, 2015. AR 16, 158. The application
2 was denied at the initial level and on reconsideration. On November 4, 2020, the ALJ held a
3 telephonic hearing and took testimony from Plaintiff and a vocational expert (VE).² AR 88–130.
4 On November 27, 2020, the ALJ issued a decision finding Plaintiff not disabled.³ AR 15–30.
5 Plaintiff timely appealed. The Appeals Council denied Plaintiff’s request for review on August 24,
6 2021 (AR 1–6), making the ALJ’s decision the final decision of the Commissioner. Plaintiff
7 appeals this final decision of the Commissioner to this Court.

8 **JURISDICTION**

9 The Court has jurisdiction to review the ALJ’s decision pursuant to 42 U.S.C. § 405(g).

10 **STANDARD OF REVIEW**

11 This Court’s review of the ALJ’s decision is limited to whether the decision is in
12 accordance with the law and the findings are supported by substantial evidence in the record as a
13 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). “Substantial evidence” means more
14 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
15 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
16 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ’s
17 decision, the Court must uphold the ALJ’s decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th
18 Cir. 2002).

19 **DISCUSSION**

20 The Commissioner follows a five-step sequential evaluation process for determining
21

22 ² The ALJ previously held a hearing in this matter on January 30, 2018, during which the ALJ took
testimony from Plaintiff and a VE. AR 37–87.

23 ³ The ALJ previously issued a decision finding Plaintiff not disabled on August 9, 2018. AR 155–75. On
January 31, 2020, the Appeals Council granted Plaintiff’s request to review the ALJ’s August 2018 opinion
and remanded the matter for further administrative proceedings. AR 177–79.

1 whether a claimant is disabled. *See* 20 C.F.R. § 404.1520 (2000).

2 At step one, the ALJ must determine whether the claimant is gainfully employed. The ALJ
3 found Plaintiff had not engaged in substantial gainful activity since the alleged onset date. AR 19.

4 At step two, the ALJ must determine whether a claimant suffers from a severe impairment.
5 The ALJ found Plaintiff has the following severe impairments: degenerative disc disease; migraine
6 headaches; and sleep apnea. AR 19. The ALJ also found that the record contained evidence of
7 hand and wrist pain, irritable bowel syndrome, and allergies; however, the ALJ found that these
8 conditions did not rise to the level of severe. AR 19.

9 At step three, the ALJ must determine whether a claimant's impairments meet or equal a
10 listed impairment. The ALJ found that Plaintiff's impairments did not meet or equal the criteria of
11 a listed impairment. AR 20–21.

12 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
13 residual functional capacity (RFC) and determine at step four whether the claimant has
14 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff able to perform
15 sedentary work, as defined in 20 C.F.R. § 404.1567(a), with the following limitations:

16 the claimant can lift/carry 10 pounds occasionally and less than 10
17 pounds frequently, stand and/or walk (with normal breaks) for 2
18 hours in an eight-hour workday, and sit (with normal breaks) for 6
19 hours in an eight-hour workday. The claimant can push/pull
20 unlimitedly within those exertional limitations. The claimant can
21 occasionally climb ramps and stairs, ladders, ropes, and scaffolds,
22 balance, stoop, kneel, crouch, and crawl. The claimant should avoid
23 concentrated exposure to vibrations, fumes, odors, gases, poor
ventilation, and even moderate exposure to workplace hazards, such
as machinery and unprotected heights.

AR 21. With that assessment, the ALJ found Plaintiff able to perform past relevant work as a data
entry clerk, staff analyst, and linguistics technician. AR 29. Because the ALJ found Plaintiff able
to perform past relevant work, the ALJ did not reach step five of the sequential analysis.

1 Plaintiff raises the following issues on appeal: (1) whether the ALJ provided clear and
2 convincing reasons for rejecting Plaintiff's testimony; (2) whether the ALJ provided legally
3 sufficient reasons for rejecting three medical source opinions; and (3) whether the ALJ provided
4 germane reasons for rejecting the testimony of Plaintiff's family members. Plaintiff requests
5 remand for an award of benefits. The Commissioner argues the ALJ's decision has the support of
6 substantial evidence and should be affirmed.

7 **1. Subjective Testimony**

8 The rejection of a claimant's subjective symptom testimony⁴ requires the provision of
9 specific, clear, and convincing reasons. *Burrell v. Colvin*, 775 F.3d 1133, 1136–37 (9th Cir. 2014);
10 *see also Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). "General findings are
11 insufficient; rather, the ALJ must identify what testimony is not credible and what evidence
12 undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). An
13 ALJ may reject a claimant's symptom testimony when it is contradicted by the medical evidence,
14 but not when it merely lacks support in the medical evidence. *See Carmickle v. Comm'r of Soc.*
15 *Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) ("Contradiction with the medical record is a
16 sufficient basis for rejecting a claimant's subjective testimony."); *Burch v. Barnhart*, 400 F.3d
17 676, 681 (9th Cir. 2005) ("[L]ack of medical evidence cannot form the sole basis for discounting
18 pain testimony.").

19 Plaintiff alleges that she is unable to work because she cannot stand or walk for more than
20 five minutes, cannot sit for more than a half hour at a time, cannot carry more than five pounds,
21

22 ⁴ Effective March 28, 2016, the Social Security Administration (SSA) eliminated the term "credibility"
23 from its policy and clarified the evaluation of a claimant's subjective symptoms is not an examination of
character. SSR 16-3p. The Court continues to cite to relevant case law utilizing the term credibility.

1 and cannot reach over her head or bend her knees, which activities cause her to have severe back
2 pain and to suffer for more than a week. AR 374, 408. Plaintiff alleges that she has to be in a
3 reclined position all day long. AR 374, 408. Plaintiff further alleges that her impairments affect
4 her ability to lift, squat, bend, sit, kneel, and climb stairs. AR 379, 411. At the hearing, Plaintiff
5 testified that her medications make her drowsy and dizzy, that she spends about 90 percent of her
6 time in bed, that there are days that she is in bed for weeks, that she cannot get up or sit, that she
7 cannot go downstairs because of dizziness, and that she has fallen a lot. AR 98, 105. Plaintiff
8 further testified that she experiences neck pain and lesions, that the pain would go down to her
9 shoulders and arms, that she experiences migraines every day, and that she has short memory loss.
10 AR 111, 114, 116.

11 Plaintiff argues that the ALJ improperly discounted Plaintiff's testimony by finding it "out
12 of proportion with the objective findings." Dkt. 8, at 6 (citing AR 24). "While subjective pain
13 testimony cannot be rejected on the sole ground that it is not fully corroborated by objective
14 medical evidence, the medical evidence is still a relevant factor in determining the severity of the
15 claimant's pain and its disabling effects." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).
16 The ALJ found Plaintiff's allegations out of proportion with an April 2015 MRI of Plaintiff's
17 lumbar spine, which revealed, among other things, "only mild facet arthropathy," "no disc
18 herniation, disc herniation, spinal stenosis, foraminal narrowing, nerve impingement, or synovial
19 cyst," and "only mild disc bulge/osteophyte complex" AR 24. The ALJ further found that
20 MRIs in May 2015 and May 2016 of Plaintiff's thoracic and cervical spine indicated stable results
21 and stable chronic degenerative changes, that the September 2016 nerve conduction studies on
22 Plaintiff's right leg were normal, that April 2015 and September 2015 MRIs of Plaintiff's brain
23 "showed stable results with no new lesions or abnormal enhancement," and that exams showed

1 that Plaintiff had normal neuro cranial nerves. AR 24. The medical records cited by the ALJ are
2 not reasonably inconsistent with Plaintiff's allegations of pain from her back and migraine
3 impairments. Rather, the April 2015 MRI noted that the findings were "common in people with
4 low back pain." AR 1686. Further, the MRIs, nerve conduction studies, and medical exams cited
5 by the ALJ evaluated Plaintiff regarding right leg pain, right leg weakness, and whether Plaintiff
6 met the criteria for multiple sclerosis. *See* AR 1395–96, 1411, 1414, 1531, 1605. These medical
7 records are not reasonably inconsistent with Plaintiff's allegations of pain from her back and
8 migraine conditions. The Commissioner argues that the ALJ accurately found that medical records
9 show that Plaintiff had normal or mostly normal results in pulmonary and cardiovascular
10 examinations, chest-x-rays, electrocardiography studies, and stress tests. Dkt. 9, at 6. However,
11 these records are similarly not reasonably inconsistent with Plaintiff's allegations of back pain and
12 migraines. Therefore, the ALJ did not provide clear or convincing reasons when discounting
13 Plaintiff's symptom testimony by finding it out of proportion with the medical record.

14 Plaintiff next argues that the ALJ improperly discounted Plaintiff's testimony based on
15 treatment records that noted Plaintiff to be in "no acute distress" during the treatment visits. Dkt. 8,
16 at 7. Citing *Combs v. Berryhill*, 878 F.3d 642 (8th Cir. 2017), Plaintiff argues that the notation "no
17 acute distress" is not significant where an individual has a chronic condition. *Id.* Here, unlike in
18 *Combs*, the ALJ did not rely on his own interpretation of "no acute distress" when assigning weight
19 to competing medical opinions. Rather, the ALJ considered evidence of Plaintiff's lack of acute
20 distress during physical examination findings to find that the medical evidence undermined
21 Plaintiff's symptom testimony. AR 24. Therefore, Plaintiff has not shown that the ALJ erred by
22 considering findings that Plaintiff appeared in no acute distress at medical appointments when
23 evaluating Plaintiff's testimony.

1 Plaintiff argues that the ALJ improperly discounted Plaintiff's symptom testimony based
2 on medical records showing normal gait, station, motor strength, muscle bulk, tone, reflexes, and
3 coordination; and the absence of cyanosis, clubbing, and edema. Dkt. 8, at 7. An ALJ may reject
4 subjective testimony upon finding it contradicted by or inconsistent with the medical record.
5 *Carmickle*, 533 F.3d at 1161. The ALJ found that "these relatively benign objective findings do
6 not support the claimant's reports of severe restrictions with lifting, standing, walking, and sitting."
7 AR 24. Although the records cited by the ALJ noted stable or normal musculoskeletal findings,
8 the records also found that Plaintiff had reduced range of motion of the cervical and lumbar spine,
9 neck tenderness and spasms, and increased pain with physical activities. *See, e.g.*, AR 647, 651,
10 655, 1017–18, 1031. It is error for the ALJ to "cherry-pick[]" statements in a medical record;
11 rather, observations "must be 'read in context of the overall diagnostic picture' the provider
12 draws." *Ghanim v. Colvin*, 763 F.3d 1154, 1162, 1164 (9th Cir. 2014) (citation omitted). Because
13 the medical records do not reasonably undermine Plaintiff's allegations of pain symptoms from
14 her back and migraine impairments, the ALJ erred by discounting Plaintiff's testimony regarding
15 her limitations by finding it unsupported by the medical records.

16 Plaintiff argues that the ALJ improperly found that statements by Plaintiff's treatment
17 providers undermined Plaintiff's testimony. Dkt. 8, at 8. The ALJ found that, in 2015, Dr. Cong
18 Yu, M.D., stated that he could not explain Plaintiff's pain pattern and why the spinal cord
19 stimulator stopped working and that, in 2017, Dr. Yu stated that Plaintiff's neck pain was "likely"
20 due to poor posture and recommended that Plaintiff undergo a TENS unit and physical therapy.
21 AR 25. The ALJ, however, failed to explain how and why Dr. Yu's statements undermined
22 Plaintiff's symptom testimony. To the contrary, Dr. Yu's statements show that Plaintiff has a
23 history of being treated for spine and neck pain. Further, although an ALJ may discount a

1 claimant's testimony regarding the severity of an impairment where the claimant was prescribed
2 only conservative treatment, *see Para v. Astrue*, 481 F.3d 742, 750–51 (9th Cir. 2007), the record
3 in this case does not support such a finding. Here, Plaintiff underwent several surgeries to implant
4 and fix a spinal cord stimulator to treat her back pain and received Botox injections and an
5 intraarticular facet block injection to treat her migraines and neck pains. AR 646, 651, 655. The
6 Ninth Circuit has found that spinal injections are not properly characterized as “conservative.” *See*
7 *Garrison v. Colvin*, 759 F.3d 995, 1015 n.20 (9th Cir. 2014). Further, the Court is not convinced
8 that a recommendation for TENS can reasonably defined as a “conservative” course of treatment.
9 *Cf. Rollins*, 264 F.3d at 856 (finding a recommendation to “avoid strenuous activities” to be a
10 conservative treatment for fibromyalgia). Therefore, the ALJ did not provide clear or convincing
11 reasons for discounting Plaintiff's testimony based on inconsistencies with Dr. Yu's statements.

12 Plaintiff further argues that the ALJ improperly found that statements from Dr. Suzanne
13 Peterson, M.D., undermined Plaintiff's testimony. Dkt. 8, at 9. In 2017, Dr. Peterson noted that
14 Plaintiff's chronic pain was stable on medication. AR 25; *see* AR 1703. Impairments that can be
15 “controlled effectively” by medication or treatment are not considered disabling for purposes of
16 determining eligibility for Social Security benefits. *See Warre v. Comm'r of Soc. Sec. Admin.*, 439
17 F.3d 1001, 1006 (9th Cir. 2006). Here, however, Plaintiff testified that she experienced side effects
18 from her medications, including drowsiness, dizziness, and severe itchiness, and that the pain
19 medications no longer work. AR 98, 104–05, 119. Indeed, the ALJ acknowledged that “the amount
20 and dosages of medication prescribed commonly result in a large portion of claimant's problems
21 with dizziness, sedation, and cognitive issues.” AR 27. Further, Plaintiff's medical records show
22 that Plaintiff has continued to experience chronic pain despite taking the prescribed pain
23 medications. *See, e.g.*, AR 2984, 3029, 3062; *see also* 20 C.F.R. § 404.1529(c)(3)(iv) (in

1 evaluating a claimant's symptom testimony, the ALJ will consider "[t]he type, dosage,
2 effectiveness, and side effects of any medication" taken by the claimant to alleviate pain and
3 symptoms). Finally, Dr. Peterson did not treat Plaintiff specifically for pain management; rather,
4 the doctor treated Plaintiff for a follow-up from a maternal-fetal medicine procedure and
5 recommended that Plaintiff continue to work with her pain management team to wean from her
6 pain medication prior to pregnancy. AR 1702–03; *see* 20 C.F.R. § 404.1527 (more weight is given
7 to the medical opinion of a specialist about medical issues related to their area of specialty).
8 Accordingly, the overall record shows neither that Plaintiff's pain was controlled effectively nor
9 that Plaintiff's pain symptoms improved with medication. *See Ghanim*, 763 F.3d at 1164
10 (observations "must be 'read in context of the overall diagnostic picture' the provider draws"
11 (citation omitted)). Therefore, the ALJ did not provide clear and convincing reasons for
12 discounting Plaintiff's testimony based on Dr. Peterson's statement.

13 Plaintiff argues that the ALJ improperly discounted Plaintiff's testimony based on a gap in
14 migraine treatment with Dr. Dongmei Liu, M.D., between September 2013 and May 2016,
15 Plaintiff's decision to turn off her nerve stimulator in December 2016 while she was trying to get
16 pregnant, and the nerve stimulator being not turned on again until August 2017. Dkt. 8, at 8–9.
17 The Appeals Council addressed both of these findings in its remand order and found that the ALJ
18 mischaracterized the record. AR 177. Specifically, the Appeals Council found that, although
19 Plaintiff did not receive treatment with Dr. Liu during September 2013 and May 2016, Plaintiff
20 was treated regularly for her migraines during this period by Dr. Yu. AR 177. Further, the Appeals
21 Council found that Plaintiff's spinal cord stimulator was turned off for only eight weeks and
22 reprogrammed in January, February, and May of 2017. AR 177 (citing AR 1064, 1069, 1695–96).
23 The Court may review the ALJ's failure to comply with the Commissioner's own regulations for

1 legal error applying a clearly erroneous standard. *See Molina v. Astrue*, 674 F.3d 1104, 1110 (9th
2 Cir. 2012), *superseded by regulation on other grounds*; *Pac. Gas & Elec. Co. v. F.E.R.C.*, 464
3 F.3d 861, 868 (9th Cir. 2006) (“[I]t is well established that an agency’s interpretation of the
4 intended effect of its own orders is controlling unless clearly erroneous.” (internal quotation marks
5 and citation omitted)). The ALJ did not resolve these issues on remand as directed by the Appeals
6 Council. Additionally, for the reasons stated by the Appeals Council, the ALJ’s reasoning is neither
7 specific, clear, or convincing. Therefore, the ALJ erred by discounting Plaintiff’s testimony based
8 on apparent treatment gaps and Plaintiff’s decision to turn off her spinal cord stimulator.

9 Plaintiff next argues that the ALJ improperly discounted Plaintiff’s testimony based on
10 Plaintiff’s inconsistent statements to treatment providers. Dkt. 8, at 9. An ALJ properly considers
11 prior inconsistent statements in evaluating a claimant’s testimony. *Tommasetti v. Astrue*, 533 F.3d
12 1035, 1039 (9th Cir. 2008). The ALJ found that, in October 2016, Plaintiff denied weakness to a
13 treating provider and “reported significant pain reduction with IV infusion and Botox treatments,”
14 and that, in October 2015 and November 2015, Plaintiff reported that her headaches were better.⁵
15 AR 25. Plaintiff testified that, even with the Botox injections and IV infusions, her migraines are
16 “still really bad,” that she has “migraines every single day,” and that the Botox and other
17 medications “takes the severity of the migraine, but it doesn’t take migraine away, and it’s always
18 there.” AR 114–15. Further, the records cited by the ALJ in October 2015 and November 2015
19 relate to headaches caused by Plaintiff’s chronic pansinusitis and not Plaintiff’s migraines.
20 AR 708, 711–12. The ALJ has failed to explain how or why these medical records are inconsistent

21 ⁵ The ALJ also found that Plaintiff reported that her sleep apnea was mild and that she no longer used the
22 CPAP machine, which finding the Commissioner argues supports the ALJ’s decision. Dkt. 9, at 8. Because
23 Plaintiff does not specifically identify error in the ALJ’s evaluation of evidence relating to Plaintiff’s sleep
apnea, the Court does not address this argument. *See Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d
1145, 1164 (9th Cir. 2003) (the court “ordinarily will not consider matters on appeal that are not specifically
and distinctly argued in an appellant’s opening brief”).

1 with Plaintiff's allegations. Therefore, the ALJ reasoning for discounting Plaintiff's testimony
2 based on inconsistent statements to treating providers is not specific, clear, or convincing.

3 Plaintiff argues that the ALJ improperly discounted Plaintiff's testimony by finding it
4 inconsistent with Plaintiff's daily activities. Dkt. 8, at 9–10. An ALJ may discount a Plaintiff's
5 symptom testimony where the “claimant is able to spend a substantial part of his day engaged in
6 pursuits involving the performing of physical functions that *are* transferrable to a work setting.”
7 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (emphasis in original); *see also Morgan v.*
8 *Comm’r of Soc. Sec. Admin*, 169 F.3d 595, 600 (9th Cir. 1999) (claimant’s ability to fix meals, do
9 laundry, work in the yard, and occasionally care for his friend’s child was evidence of claimant’s
10 ability to work). The ALJ found that “aside from straightening or curling her hair, [Plaintiff] does
11 not have any significant difficulty with her personal care, which includes dressing, hair care,
12 feeding herself, and using the bathroom.” AR 25. The ALJ also found that Plaintiff is able to
13 prepare simple meals independently, drive a car when needed, manage her own money, shop
14 online, sing, read, socialize on the phone and in person, and go to church, doctor’s appointments,
15 and the disability office. AR 25. The ALJ’s finding that Plaintiff does not have significant
16 difficulty caring for herself is not supported by substantial evidence. Plaintiff reported on her
17 function reports that she cannot stand or lift her arms while performing personal care and that it is
18 hard for her to clean herself after using the toilet. AR 375. Plaintiff similarly reported difficulty
19 standing when preparing frozen meals and that she only drives when it is urgent to go to a doctor’s
20 appointment. AR 376–77. Further, although Plaintiff reported that she is able to manage her
21 money, sing, read, and engage in limited socialization, the ALJ failed to explain how these
22 activities undermine Plaintiff’s allegations that she experiences disabling back and migraine pain,
23 particularly where these activities do not clearly require the performance of physical functions in

1 the workplace. *See Fair*, 885 F.3d at 603 (“The Social Security Act does not require that claimants
2 be utterly incapacitated to be eligible for benefits . . .”). Therefore, the ALJ did not provide
3 specific, clear, or convincing reasons for discounting Plaintiff’s testimony based on inconsistency
4 with Plaintiff’s daily activities.

5 Plaintiff next argues that the ALJ improperly found that Plaintiff performed work activities
6 during the period at issue, specifically that Plaintiff cared for her disabled father between January
7 2015 and September 2015. Dkt. 8, at 11 (citing AR 25–26). Although Plaintiff reported that her
8 husband helped care for her father, the ALJ found that Plaintiff cared for her father during the day
9 while her husband worked, “which can be quite physically demanding, without any particular
10 assistance.” AR 26. Here, however, Plaintiff testified that her brother was helping her care for her
11 father because she could not do all the work, that her care activities consisted of reminding her
12 father to take his medications, and that they eventually transferred the caregiving to her brother.
13 AR 47. Plaintiff’s testimony shows neither that she provided physical care for her father nor that
14 she cared for him without assistance. Therefore, the ALJ did not provide specific, clear, or
15 convincing reasons for discounting Plaintiff’s testimony by finding it inconsistent with her ability
16 to care for her disabled father.

17 Plaintiff argues that the ALJ improperly discounted Plaintiff’s testimony by finding it
18 inconsistent with Plaintiff’s ability to travel out of state. Dkt. 8, at 11. The ALJ found that Plaintiff
19 testified to being able to travel by plane to visit family in 2016 and 2017 and that these activities
20 were “inconsistent with the claimant’s claims that pain prevents her from standing or sitting for
21 only a few minutes.” AR 26. Here, there is no evidence that Plaintiff remained seated for the
22 duration of the flights or that Plaintiff did not stand up or recline at intervals to sufficiently
23 undermine Plaintiff’s testimony regarding her sitting and standing limitations. *See Tackett v. Apfel*,

1 180 F.3d 1094, 1103 (9th Cir. 1999) (ability to travel by car long distance not inconsistent with
2 physician's assessment of sitting limitations when there was no evidence of the frequency or
3 duration of rest stops, or whether claimant rode sitting up, reclining, or lying down); *see also*
4 *Howard v. Heckler*, 782 F.2d 1484, 1488 (9th Cir. 1986) (declining to find claimant's "claim of
5 disability gainsaid by his capacity to engage in periodic restricted travel"). Further, Plaintiff
6 testified that she used a wheelchair while in the airport. AR 73. Therefore, the ALJ did not provide
7 specific, clear, or convincing reasons for discounting Plaintiff's testimony based on Plaintiff's
8 traveling to visit family in 2016 and 2017.

9 Finally, Plaintiff argues that the ALJ improperly discounted Plaintiff's testimony by
10 finding it undermined by Plaintiff's use of opiates and inconsistent with Plaintiff's attempts to start
11 a family. Dkt. 8, at 11–13. The ALJ found that the amount and type of medications prescribed to
12 Plaintiff, which included Oxycodone, "perplexing" given Plaintiff's documented allergy to
13 Oxycodone and that Plaintiff's plans to become pregnant were inconsistent with "reports of
14 disabling pain that require high doses of narcotics." AR 26–27. "[T]o reject the specific portions
15 of the claimant's testimony that the ALJ has found not to be credible, we require that the ALJ
16 provide clear and convincing reasons relevant to that portion. *Smith v. Kijakazi*, 14 F.4th 1108,
17 1113 (9th Cir. 2021) (citing *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001) ("[T]he
18 ALJ must specifically identify the testimony she or he finds not to be credible and must explain
19 what evidence undermines the testimony.")). Here, the ALJ failed to identify specific portions of
20 Plaintiff's testimony that were inconsistent with Plaintiff's prescribed course of pain medication
21 or that was inconsistent with Plaintiff's prior attempts to start a family. Therefore, the ALJ did not
22 provide specific, clear, or convincing reasons for discounting Plaintiff's testimony based on
23 inconsistent with Plaintiff's prescribed medications.

2. Medical Opinions

The regulations applicable to Plaintiff's case require the ALJ to weigh medical opinions regardless of the source.⁶ 20 C.F.R. § 404.1527(c). Under these regulations, the ALJ is required to give "controlling weight" to a treating physician's opinion if it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [claimant's] case record." *Id.* § 404.1527(c)(2). More weight should be given to the opinion of a treating doctor than to a non-treating doctor, and more weight should be given to the opinion of an examining doctor than to a non-examining doctor. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Where not contradicted by another doctor, a treating or examining doctor's opinion may be rejected only for "clear and convincing" reasons. *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). Where contradicted, a treating or examining doctor's opinion may not be rejected without "specific and legitimate reasons" supported by substantial evidence in the record for so doing." *Lester*, 81 F.3d at 830–31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

With these regulations and considerations in mind, the Court proceeds to its analysis of the medical evidence in this case.

A. Dr. Cong Yu, M.D.

Dr. Yu, Plaintiff's treating physician, provided an assessment of Plaintiff's physical functioning dated January 26, 2018. AR 2594–97. Dr. Yu diagnosed Plaintiff with low back and leg pain caused by disc degenerative disorder and opined that Plaintiff could stand/walk for 30

⁶ In 2017, the Social Security Administration amended its regulations and removed the "controlling weight" requirement for all applications filed after March 27, 2017. *See* 20 C.F.R. §§ 404.1520c, 416.920c (2017). Because Plaintiff's claim was filed before March 27, 2017, the new rules are not applicable to Plaintiff's case.

1 minutes at one time up to two hours and sit for 30 minutes at one time up to four hours during an
2 eight-hour workday, noting that Plaintiff's pain increases as she stands longer. AR 2594–95.
3 Dr. Yu further opined that, during an eight-hour workday, Plaintiff would need to alternate
4 between sitting, standing, and/or walking every 30 minutes, could frequently lift and carry between
5 six and 10 pounds, could frequently perform repetitive tasks with her upper extremities, would not
6 be able to maintain an average work pace, would require more than 15-minute work breaks every
7 30 minutes, and would be off task more than 15 percent of the day. AR 2595–97.

8 In deciding the weight to give to any medical opinion, the ALJ considers factors such as
9 the examining relationship, the treatment relationship, supportability, consistency, specialization,
10 and other factors which tend to support or contradict the opinion, including the source's
11 understanding of the agency's disability program and evidentiary requirements, and the source's
12 familiarity with the case record. 20 C.F.R. § 404.1527(c). The ALJ gave significant weight to
13 Dr. Yu's opinion that Plaintiff can stand/walk for two hours and lift/carry 10 pounds frequently.
14 AR 28. However, the ALJ gave little weight to Dr. Yu's assessment that Plaintiff is limited in her
15 ability to sit, be on task, and maintain an average work pace and that Plaintiff would require a
16 sit/stand option and extra work breaks. AR 28. The ALJ found that Dr. Yu did not explain why he
17 assessed Plaintiff with these limitations and that the doctor's opinion was inconsistent with the
18 record as a whole. AR 28.

19 Plaintiff argues that the ALJ improperly discounted Dr. Yu's assessed limitations by
20 finding that the doctor did not explain why the limitations were necessary. Dkt. 8, at 14. Plaintiff
21 argues that Dr. Yu attributed the limitations to pain and the limitations were consistent with the
22 doctor's treatment notes. *Id.* An ALJ "may take into account the quality of the explanation when
23 determining how much weight to give a medical opinion." *Ford v. Saul*, 950 F.3d 1141, 1155 (9th

1 Cir. 2020). The ALJ found that Dr. Yu did not explain why Plaintiff required a sit/stand option or
2 extra work breaks, would be off task more than 15 percent, and why Plaintiff would not be able to
3 maintain an average work pace. AR 28. Contrary to the ALJ's finding, Dr. Yu explained that he
4 assessed that Plaintiff could not stand, walk, or sit for longer than 30 minutes at one time because
5 Plaintiff's pain increased when she performs these activities for long. AR 2594–95. Further, in
6 assessing that Plaintiff would need to alternate between sitting and standing every 30 minutes,
7 would need extra work breaks every 30 minutes, and would be off task more than 15 percent of an
8 eight-hour workday, the questionnaire completed by Dr. Yu identified that these limitations were
9 based on “impairments/pain or the side-effects of medication.” AR 2595–97. Further, it is
10 reasonably clear from Dr. Yu's opinion that his opinion concerning sit/stand options, extra breaks,
11 pace, and being off task are derived from the doctor's assessment that Plaintiff could not stand,
12 walk, or sit for longer than 30 minutes. *See* AR 2594–95. Therefore, the ALJ's reason for
13 discounting Dr. Yu's opinion based on lack of explanation is not supported by substantial
14 evidence.

15 Plaintiff argues that the ALJ improperly substituted his own interpretation of the medical
16 record in place of Dr. Yu's interpretation. Dkt. 8, at 14. “The ALJ must set out in the record his
17 reasoning and evidentiary support for his interpretation of the medical evidence.” *Tackett v. Apfel*,
18 180 F.3d 1094, 1102 (9th Cir. 1999). The ALJ found that “there is no logical bridge drawn from
19 the limitations opined [by Dr. Yu] back to the cause of the limitations, other than to cite subjective
20 complaint of ‘pain.’” AR 28. Here, the record contains several of Dr. Yu's treatment records, in
21 which the doctor treated Plaintiff for chronic low back pain, migraine headache, and other
22 ailments. *See* AR 642–98. These treatment records are consistent with Dr. Yu's opinion, yet the
23 ALJ's decision does not discuss Dr. Yu's treatment records or explain how and why the ALJ

1 afforded little weight to Dr. Yu's opinion despite this evidence. Rather, the ALJ appears to have
2 given substantial weight to the opinion of agency consultant Dr. Norman Staley, M.D., who
3 assessed Plaintiff with limitations consistent with sedentary work. AR 27–28, 150–52. Notably,
4 Dr. Staley's opinion provided no supporting explanation for his assessment of Plaintiff's physical
5 limitations. AR 150–52. Opinions supported by explanation and treatment records cannot be
6 outweighed by opinion of a non-examining physician "who merely checked boxes without giving
7 supporting explanations." *Holohan*, 246 F.3d at 1205. Therefore, the ALJ erred by failing to give
8 proper weight to the opinion of Plaintiff's treating provider.

9 The Commissioner argues that the ALJ properly rejected Dr. Yu's opinion by finding it
10 inconsistent with the record. Dkt. 9, at 14. An ALJ may reject a physician's opinion that is
11 inconsistent with the medical record. *See Tommasetti*, 533 F.3d at 1041. The ALJ found Dr. Yu's
12 assessed limitations inconsistent with the objective findings, including Plaintiff's treatment
13 history, her performances at appointments and examination, and her daily and traveling activities.
14 AR 28. In support of this finding, the ALJ cites to substantially the same medical records cited in
15 the ALJ's evaluation of Plaintiff's symptom testimony. *Compare* AR 24–25 with AR 28. Dr. Yu
16 stated that he based his diagnoses of low back and leg pain on Plaintiff's disc degenerative disorder
17 and assessed Plaintiff's functional limitations due to these impairments. AR 2594. As discussed
18 above, the medical records cited by the ALJ evaluated Plaintiff in relation to other impairments,
19 including right leg pain, right leg weakness, chronic pansinusitis, chest pain, brain abnormalities,
20 and whether Plaintiff met the criteria for multiple sclerosis. AR 28 (citing AR 1414, 1531, 1602–
21 04, 1610, 1683, 1686–89, 1808, 1811, 1899, 1926, 1938). Further, Plaintiff's MRIs showed stable
22 chronic degenerative changes, the April 2015 MRI specifically noted that the findings were
23 "common in people with low back pain," and, although the records cited by the ALJ noted stable

1 or normal musculoskeletal findings, the records also found that Plaintiff had reduced range of
2 motion of the cervical and lumbar spine, neck tenderness and spasms, and increased pain with
3 physical activity. *See, e.g.*, AR 1414, 1686. AR 647, 651, 655, 1017–18, 1031. Finally, as
4 discussed above, the evidence cited regarding Plaintiff’s daily and travel activities does not
5 reasonably show that Plaintiff maintains a greater level of physical functioning. Accordingly, these
6 medical records are not reasonably inconsistent with Dr. Yu’s opinion that Plaintiff’s disc
7 degenerative disorder causes Plaintiff’s back and leg pain and results in functional limitations.

8 B. Dr. Stuart Rubin, M.D., and Dr. Kevin Sperber, M.D.

9 On February 27, 2015, Dr. Rubin reviewed Plaintiff’s medical records and opined that,
10 between February 27, 2014, and February 27, 2015, Plaintiff had the following limitations: sit for
11 30 minutes at a time for up to three hours per day; stand/walk for 30 minutes at a time up to one
12 hour per day; lift/carry/push/pull up to 10 pounds; never reach above shoulder level or below desk
13 level; frequently reach at desk level; and unrestricted use of hands. AR 2051. On August 21, 2015,
14 Dr. Rubin reviewed a medical record from July 27, 2015, and noted that there was not enough
15 information to comment on Plaintiff’s functionality from August 2015 through October 2015.
16 AR 2021–22.

17 On January 11, 2016, Dr. Sperber reviewed Plaintiff’s medical records and opined that
18 Plaintiff’s “limitations are based solely on her perceived pain and her tolerance for any noxious
19 sensations associated with activity . . . [which] could conceivably significantly increase pain albeit
20 transiently.” AR 2253. Dr. Sperber assessed the following functional limitations for the period
21 from January 30, 2015, and beyond: lift no more than five pounds up to three times per hour; squat
22 up to four times per hour; stand/walk with a five-minute break at least every 20 minutes; sit with
23 a five-minute break every 30 minutes; no extremes of extension, flexion, or twisting; no climbing

1 ladders; and drive only two hours per day. AR 2254.

2 The ALJ gave little weight to Drs. Rubin and Sperber's assessment of Plaintiff's functional
3 limitations. AR 29. The ALJ found that the doctors' opinions were remote in that they were
4 completed in 2015 and 2016, vary in degree in work limitations, do not represent Plaintiff's current
5 physical condition, and that neither doctor had contact with Plaintiff after this period. AR 29.

6 Plaintiff argues that the ALJ improperly rejected Drs. Rubin and Sperber's opinions based
7 on the opinions being completed in 2015 and 2016. Dkt. 8, at 16. An ALJ may reject a medical
8 opinion where that opinion is outside the relevant period. *See Carmickle*, 533 F.3d at 1165. Here,
9 however, the opinions provided by Drs. Rubin and Sperber were not outside the relevant period;
10 rather, the opinions specifically identified functional limitations covering a period that includes
11 January 30, 2015, the alleged onset date. Further, the ALJ did not identify any more recent opinions
12 that he relied on in place of Drs. Rubin and Sperber's opinions. *See Johnson v. Astrue*, 303 F.
13 App'x 543, 545 (9th Cir. 2008) (affirming ALJ's rejection of medical opinions that were remote
14 in time and the ALJ's reliance on more recent opinions). Rather, the ALJ appears to have relied
15 on the May 2016 opinion of Dr. Staley, which was produced around the same time as Dr. Rubin
16 and Sperber's opinions. AR 27–28. Therefore, the ALJ's reason for rejecting Drs. Rubin and
17 Staley's opinions based on the opinions being remote was not clear or convincing.

18 Plaintiff next argues that the ALJ improperly rejected Drs. Rubin and Sperber's opinion by
19 finding that the opinions varied in degree of work limitations to none to less than sedentary. Dkt. 8,
20 at 16. Although Drs. Rubin and Sperber did not assess entirely identical functional limitations,
21 both doctors assessed limitations that are less than or consistent with sedentary work. *See* 20 C.F.R.
22 § 404.1567(a) (defining sedentary work). Contrary to the ALJ's finding, neither doctor assessed
23

1 no limitations.⁷ Accordingly, the ALJ did not provide clear or convincing reasons for discounting
2 Drs. Rubin and Sperber's opinions by finding that the opinions varied in degree of work
3 limitations.

4 **3. Lay Testimony**

5 Plaintiff contends that the ALJ failed to properly evaluate the function reports completed
6 by Plaintiff's family members. "Lay testimony as to a claimant's symptoms is competent evidence
7 that an ALJ must take into account, unless he or she expressly determines to disregard such
8 testimony and gives reasons germane to each witness for doing so." *Lewis v. Apfel*, 236 F.3d 503,
9 511 (9th Cir. 2001). An ALJ may discount lay witness testimony on grounds that it conflicts with
10 the medical evidence. *Id.*

11 Plaintiff argues that the ALJ failed to provide specific and germane reasons for rejecting
12 the lay testimony. Dkt. 8, at 17. The ALJ found that Plaintiff's family members' statements were
13 similar to Plaintiff's own subjective complaints and rejected the lay statements for the same
14 reasons that the ALJ rejected Plaintiff's own subjective testimony. AR 29. An ALJ may reject lay
15 witness testimony "[w]here lay witness testimony does not describe any limitations not already
16 described by the claimant, and the ALJ's well-supported reasons for rejecting the claimant's
17 testimony apply equally well to the lay witness testimony." *Molina*, 674 F.3d at 1117. Here, as
18 discussed above, the ALJ failed to provide well-supported reasons for rejecting Plaintiff's
19 symptoms testimony. Therefore, the ALJ failed to provide germane reasons for rejecting the lay
20 witness testimony.

21
22 ⁷ Dr. Rubin's August 2015 did not contain an assessment of Plaintiff's functional limitations for the period
23 August 1, 2015, to October 30, 2015, noting that "there is not enough information based on a paucity of
physical examination abnormalities or a functional assessment to comment upon regarding her
functionality." AR 2022. Dr. Rubin's inability to assess Plaintiff's functionality in August 2015, however,
cannot reasonably be interpreted as a finding of no limitations.

4. Remedy

The Court has discretion to remand for further proceedings or for an award of benefits. *See Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). However, a remand for an immediate award of benefits is an “extreme remedy” appropriate “only in ‘rare circumstances.’” *Brown-Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015) (quoting *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014)); *accord Leon v. Berryhill*, 880 F.3d 1044, 1045 (9th Cir. 2017) (“An automatic award of benefits in a disability benefits case is a rare and prophylactic exception to the well-established ordinary remand rule.”).

Before remanding a case for an award of benefits, three requirements must be met. First, the ALJ must have “‘failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion.’” *Brown-Hunter*, 806 F.3d at 495 (quoting *Garrison*, 759 F.3d 995 at 1020). Second, the Court must conclude “‘the record has been fully developed and further administrative proceedings would serve no useful purpose.’” *Id.* In doing so, the Court considers the existence of “‘outstanding issues’” that must be resolved before a disability determination can be made. *Id.* (quoting *Treichler*, 775 F.3d at 1105). Third, the Court must conclude that, “‘if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand.’” *Id.* (quoting *Garrison*, 759 F.3d at 1021).

In this case, the first and second requirements have been met. As described above, the ALJ failed to provide legally sufficient reasons for rejecting Plaintiff’s symptom testimony, the opinion of Plaintiff’s treating physician Dr. Yu, the opinions of examining physicians Drs. Rubin and Sperber, and the lay testimony of Plaintiff’s family members. Additionally, the Commissioner held two administrative hearings in this matter, during which the ALJ took testimony from Plaintiff and vocational experts. Further, the record contains opinion evidence from Plaintiff’s treating and non-

1 examining providers, medical records, and laboratory reports spanning from late-2014 to late-2020
2 and covering the relevant period. Therefore, the Court finds that this matter has been fully
3 developed and further administrative proceedings would serve no useful purpose.

4 Under the third requirement, the Court considers whether it is clear from the record that
5 the ALJ would be required to find the claimant disabled if he considered the claimant's evidence.
6 *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002). Dr. Yu is Plaintiff's treating provider
7 and, as discussed above, Dr. Yu's opinion is well-supported by the medical findings and not
8 reasonably inconsistent with other substantial evidence in the record. Therefore, Dr. Yu's opinion
9 is properly accorded controlling weight. *See* 20 C.F.R. § 404.1527(c)(2) ("If we find that a treating
10 source's medical opinion on the issue(s) of the nature and severity of your impairment(s) is well-
11 supported by medically acceptable clinical and laboratory diagnostic techniques and is not
12 inconsistent with the other substantial evidence in your case record, we will give it controlling
13 weight."). Dr. Yu assessed that Plaintiff could stand/walk for up to two hours per day, could sit for
14 up to four hours per day in 30-minute intervals, and would be off task more than 15 percent of the
15 day. AR 2594–97. At the 2020 hearing, the VE testified that an individual with these standing,
16 walking, and sitting limitations would be unable to sustain full-time work and that an individual
17 who is off task more than 10 percent of the day would be at risk of termination. AR 125, 127.
18 Based on the VE's testimony, Plaintiff would be precluded from maintaining gainful employment
19 when properly crediting the limitations assessed by Dr. Yu. Therefore, the Court finds that the
20 third requirement has been met, and this matter should be reversed and remanded for an award of
21 benefits.

22 //

23 //

CONCLUSION

For the reasons set forth above, this matter is REVERSED and REMANDED for an award of benefits.

DATED this 17th day of June, 2022.



MARY ALICE THEILER
United States Magistrate Judge